

Fair Political Practices Commission

Memorandum

To: Chairman Getman, Commissioners Downey, Knox and Swanson

From: John W. Wallace, Assistant General Counsel
Luisa Menchaca, General Counsel

Subject: March 2003 Work Plan Revisions

Date: February 20, 2003

I. INTRODUCTION

Each year the Commission approves a regulatory work plan for the next calendar year.¹ The plan provides for quarterly work plan revisions. Attached is the March update to the regulatory work plan for calendar year 2003 reflecting changes during the first quarter.

Currently, there are 27 items on the regulation calendar under five category headings (attached). Six items have been completed, leaving 21 remaining items. Section II of the memorandum discusses recommended revisions to the calendar.

II. PROPOSED REVISIONS

A. STATUTORILY REQUIRED OR OTHERWISE HIGH-PRIORITY ITEMS

- **Item 3: Regulation 18754; Section 87302.6: Newly Created Boards & Commissions:** New section 87302.6² (Chapter 264, Stats. 2002.) became effective January 1, 2003. The section requires members of boards and commissions of newly created state and local agencies to file statements of economic interests in the same manner as officials covered by section 87200 until the members are included in an approved conflict of interest code. Staff recommends that the Commission adopt a regulation to clarify unclear aspects of the statute, such as the place for filing.

CHANGE: This item was initially set for pre-notice discussion in January. The initial hearing was postponed to March so that an interested persons meeting could be conducted in February and was redesignated an adoption hearing. Both these changes are indicated on the chart.

- **Item 4: Section 87105, Regulation 18702.5: Declaring a Conflict of Interest:** This new statute requires that a public official who holds an office specified in section 87200 and who has a financial interest in a decision publicly identify the financial interest giving rise to the

¹ See staff memorandum dated November 26, 2002, *Adoption of 2003 Regulation Calendar*.

² All references are to the Government Code.

conflict of interest, recuse himself or herself from discussing and voting on the matter, and leave the room until after the discussion, vote, or other disposition of the matter is concluded, except as specified. Proposed regulation 18702.5 clarifies ambiguities in the statute.

CHANGE: This item was initially set for pre-notice discussion in January. The initial hearing was postponed to March so that an interested persons meeting could be conducted in February and was redesignated an adoption hearing. Both these changes are indicated on the chart.

- **Item 6: Section 89519: Surplus Funds:** The general rule of the personal use law is that any expenditure of campaign funds must be, at a minimum, reasonably related to a political, legislative, or governmental purpose associated with the candidate's office. (Section 89510.) However, where an expenditure confers a substantial personal benefit on the candidate, the expenditure must be directly related to a political, legislative, or governmental purpose. (Section 89510.) Where campaign funds become surplus campaign funds, the personal use law further limits their expenditure. An interpretive regulation was adopted by the Commission in 1990 to specify when funds become surplus under different scenarios. However, the Office of Administrative Law rejected the regulation and it was never refiled. Since the advent of Proposition 34 and its numerous transfer and termination provisions, the treatment of surplus campaign funds has once again become an issue. Staff proposes recodifying the former regulation (former regulation 18587).

CHANGE: This item was set for June adoption. The regulation calendar has been modified to reflect either pre-notice or adoption in June, with adoption (if necessary) in August.

B. ON-GOING PROJECTS: Campaign

- **Item 2. "Independent Expenditure" - Clarify definition:** Regulation 18225.7 defines expenditures "made at the behest of" a candidate, which include coordinated expenditures treated as contributions under the Act. It is anticipated that staff will present for further pre-notice discussion or adoption revision of the current regulation, to more clearly and specifically define conduct that constitutes coordination.

CHANGE: This item was set for adoption in January. However, at the January meeting, the item was considered and then put over for further consideration in March. The March hearing will be a pre-notice or adoption hearing.

- **Item 3. Regulation 18225. Expenditure:** The Commission will discuss "express advocacy" as defined in this regulation.

CHANGE: A staff memorandum discussing this item was originally scheduled for January and was moved to March due to pending litigation. Pre-notice discussion of any regulation language, if necessary, will occur in May.

- **Item 4. Requested Amendment Regulation 18116: Filing Dates.** In an August 5, 2002 letter from Colleen C. McAndrews, the Commission was asked to extend the exception to traditional late contribution reports.

CHANGE: The Commission considered this issue and decided no action was necessary. However, they asked to revisit the issue in two years.

- **Item 5. Regulation 18428: Affiliated Entities:** Regulation 18428 addresses the disclosure and notification requirements of affiliated entities that participate in the financing of elections. (§ 84211.) Originally, regulation 18428 implemented the Commission's *Kahn* ((1976) 2 FPPC Ops. 151) and *Lumsdon* ((1976) 2 FPPC Ops. 140) opinions requiring a "combination of persons" file one campaign statement. The regulation defined "affiliated entities" as "a person or group of persons whose campaign contributions are directed and controlled by another." Further work concerning the disclosure requirements is needed. Amendments to Form 460 are anticipated.

CHANGE: The interested persons meeting originally scheduled for January has been moved to March. Pre-notice or adoption is anticipated in May.

C. ON-GOING PROJECTS: CONFLICT OF INTEREST AND OTHERS

- **Item 2. Conflict of Interest and General Plans.** Some agencies are viewing general plan amendments as coming within the purview of "zoning or rezoning" decisions under subdivisions (a)(1) and (a)(6) of regulation 18704.2. Because general plans cover the entire jurisdiction, officials of these agencies believe they cannot participate in such decisions unless the "public generally" or "legally required participation" exceptions apply. This results in substantial difficulties, in that all of the members of a governing board of an agency may be unable to participate in some of the most fundamental decisions affecting the entire jurisdiction. Staff is anticipating regulatory action involving clarification of and refinement to the conflict-of-interest rules as applied to these types of decisions. This project will also include consideration of the "segmentation and bifurcation" procedures referred to in Commission advice letters. The procedure is used when a governmental decision may be "segmented" into a series of decisions in which a public official may have a conflict in one decision in the series but not others.

CHANGE: To allow for an additional interested persons meeting, the pre-notice hearing scheduled for January was moved to April. The interested persons meeting was held in February. Adoption will occur in June.

- **New item 3. Segregation of Decisions, Regulation 18709:** Generally, the conflict of interest rules of the Act are applied on a decision-by-decision basis. Thus, where a major series of decisions can be “segmented” into smaller decisions, the official may be able to participate in some of those decisions. This regulation codifies a process for segmentation.

CHANGE: New item introduced in relation to Item 2 above. Pre-notice discussion is scheduled for April. Adoption is set for June.

- **Item 6. Regulation 18329.5: Formal Written Advice and Informal Assistance.** This item includes procedures that will enable the Commission to effectively advise individuals of an agency, or code reviewing bodies, on the content of an agency’s conflict of interest code. The proposal stems from implementation of the Commission’s review of issues pertaining to conflict of interest codes and SEIs.

CHANGE: This item was set for adoption in January. However, at the January meeting, the item was considered and then put over for further hearing in April. An interested persons meeting was held in February.

D. OTHER MISCELLANEOUS ITEMS

NO CHANGES

E. NEW ITEMS

- **Item 1. Regulation 18530.2:** Transfer/attribution of funds raised prior to Proposition 34 limits. This proposed regulation addresses the circumstances under which a candidate may transfer without attribution, to other committees of the same candidate, funds held by the candidate prior to the effective date of Proposition 34.

CHANGE: Emergency adoption occurred in January. The item is set for permanent adoption in April.

- **Item 2. Regulation 18370 State Agency Ethics Training:** With passage of AB 3022, the requirement to receive ethics training has been expanded from high-level public officials to all officials required to file statements of economic interests. This may require revision to Regulation 18370.

CHANGE: Set for adoption in June.

- **Item 3. Regulation 18404.1 Termination of Committees Appeal Procedure.** Regulation 18404.1 requires termination of committees after a specified period of time. However, the regulation also allows the Executive Director to extend this period under certain circumstances. This proposed project would develop a procedure for the appeal of the Executive Director's decision.

CHANGE: Set for adoption in June.

- **Item 4. Regulation 18427.1 Notification to Contributors of \$5,000 or More:** Vigo Nielsen of Nielsen Merksamer has requested amendment of this regulation to clean up ambiguous language. Mr. Nielsen proposes an amendment to regulation 18427.1(b) to clarify the notice to major donors that they must file a Late Report if their contribution or expenditure occurs during the late contribution period. Mr. Nielsen cautions that the current wording is unclear.

CHANGE: Set for adoption in September.

Attachment